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In the Supreme Court of the United States.

OCTOBER TERM, 1903.

AH HOW, ALIAS LOUIE AH HOW, APPELLANT,
v.
THE UNITED STATES. } No. 307.

CHU DO, ALIAS CHU GEE, APPELLANT,
v.
THE UNITED STATES. } No. 308.

LEW GUEY, APPELLANT,
v.
THE UNITED STATES. } No. 309.

TOM HONG, ALIAS HOM POE, APPELLANT,
v.
THE UNITED STATES. } No. 310.

TOM DOCK, ALIAS HOM DOCK, APPELLANT,
v.
THE UNITED STATES. } No. 311.

YUNG LEE, APPELLANT,
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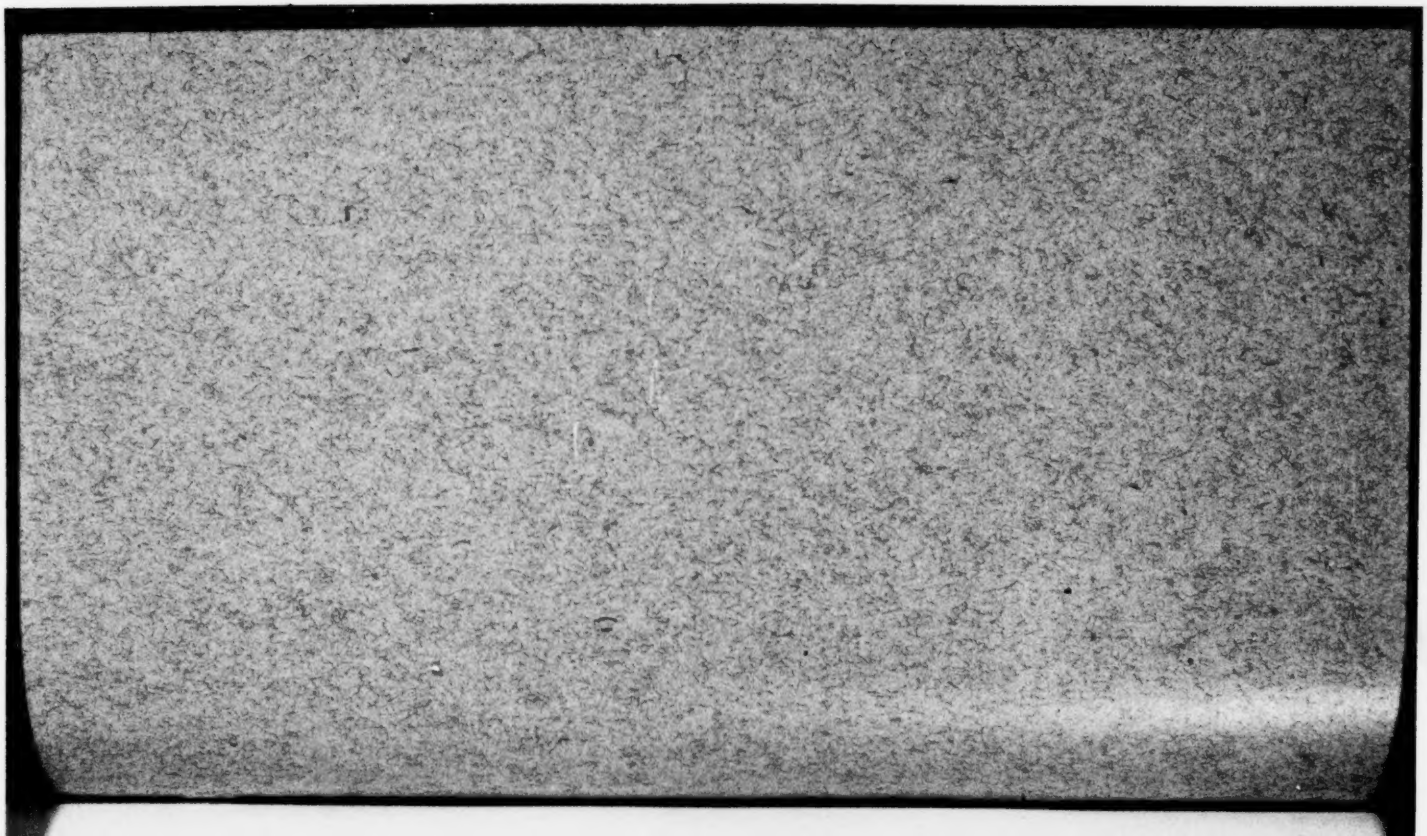
APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

MOTIONS ON BEHALF OF THE UNITED STATES TO VACATE ORDERS ADMITTING TO BAIL; AND TO DISMISS OR AFFIRM THE APPEALS.



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MOTIONS ON BEHALF OF THE UNITED STATES TO VACATE ORDERS ADMITTING TO BAIL; AND TO DISMISS OR AFFIRM THE APPEALS.

The Solicitor-General respectfully submits motions herein on behalf of the United States (1) to vacate the orders admitting to bail; and (2) to dismiss or affirm the appeals.

These Chinamen are laundrymen—that is, laborers—claiming to be merchants or native-born citizens—the usual situation. In two cases (Lew Guey; Chu Do, alias Chu Gee) the claim of citizenship was really made; in two others (Yung Lee; Ah How, alias Louie Ah How) the commissioner's order of deportation erroneously states that this claim was made; at least, from the evidence only the merchant claim appears in the two latter cases as in all the remaining ones.

In Lew Guey's case the alleged citizen presented a certificate of a former United States commissioner, purporting to be a certified copy of entries on his docket and showing that a Chinaman of that name had been before him some years ago charged with being unlawfully within the United States, and had been discharged. (Lew Guey, Rec., pp. 3–4.) Although it is stated that the discharge was on the ground of citizenship duly established, it still remains patent that the Chinaman now charged as Lew Guey has not at all been identified as the Lew Guey of the certificate. It is a notorious fact in the history of the administration of the Chinese exclusion laws that Commissioner McGettrick's "certificates," ostensibly mere certifications of his docket, were issued without any authority of law and were fraudulently used. It is especially clear that the issue was without warrant when we consider that the regular and exclusive certificates of the law are intended to constitute one of the most

important safeguards against unlawful immigration; and the "McGettrick certificates" were (and, as this case shows, still are) used fraudulently in a wholesale way, and were (and probably still are) the subject of widespread barter and sale for such use. That such certificates had no legal standing, and may and ought to be ignored by all Government officers, executive and judicial, does not affect the scandal of their issue and use for the illicit purpose which invokes them now on the chance that the claim of *res adjudicata* and identity may be successful. Furthermore, it is a commonplace of the subject to say that the claims of merchant status and of citizenship in which this high right has been asserted and founded on the most manifest perjuries, passed successfully before Commissioner McGettrick in an astonishing number of cases—cases which show, in the belief of the Treasury officers, the most evident lack of truth, merit, and good faith. The McGettrick certificate in this case was finally admitted by the commissioner, merely as showing a hearing before McGettrick, on the date named, in the case of a Chinaman named Lew Guey (id., p. 10).

The oral testimony offered by Lew Guey is to the effect that he was born in San Francisco; went to China when quite young; was before Commissioner McGettrick in 1897, when his "father" was present to identify him; his father told him he had been born in San Francisco; that is the only way he knows; his father has been

dead two years; he returned from China to the United States when about 15 years old (pp. 5–6).

In the case of Chu Do it was asserted that the father would be produced, but finally the alternative "uncle" appeared, who testified that the Chinaman was his nephew, was born in San Francisco twenty-six years before, and that he saw him there as an infant. (Chu Do, Rec., pp. 11, 12.) The witness's memory was not at all clear as to persons and occurrences in San Francisco about that time (p. 16), which is another well-known feature of such cases.

The merchant claims rest upon the testimony of substantially the same witnesses in all the cases. Indeed, the formality and uniformity of the testimony was such that before the list of cases was concluded it was stipulated that one witness would testify in a given and particular case as he had testified in the previous cases, and conceded that if another witness were called he would do the same thing. (Tom Hong, Rec., p. 9.) The testimony, then, in all the merchant cases is that a certain witness, as a collector of rents, had known the Chinaman for some years as a member of a firm. He had seen him selling goods when the rents were collected. He was told he was a member of the firm by other Chinamen connected with the establishment; he did not know in any other way. In one case—that of Yung Lee—the merchant claim was not made, but the Chinaman asserted that he was ill during the extension of the

period within which he was entitled under the acts of 1892 and 1893 to obtain a certificate of residence as a laborer entitled to remain in the United States; and a witness of similar character to the others, one whose calling and trade took him among the Chinese, corroborated this assertion. He knew the Chinaman; knew he was ill during the time mentioned; saw him in bed. (Yung Lee, Rec., pp. 5–7.)

The testimony, then, was perfunctory, largely immaterial, and entirely inconclusive and unsatisfactory. The commissioner's findings were clearly justified. The present laborer status was admitted, but it was alleged that at various periods in the past, and for varying lengths of time, the claimants had been members of one or other mercantile firms. Very naturally, under these facts and upon this unconvincing testimony, the commissioner was not satisfied by affirmative evidence that the Chinamen were entitled to remain in this country, and he ordered them to be deported. This order was affirmed by the district court upon appeal. (Ah How, Rec., pp. 11–12.) Thereafter, by orders of Mr. Justice Peckham, appeals were allowed to this court, and the Chinamen were admitted to bail pending the hearing and determination of the appeals.

Nor is my suggestion that the testimony herein is immaterial or worthless to be looked upon as mere assumption or unnecessary and unfounded suspicion. Apart from the established finality of

the findings below in such cases as the present, when the court has not been called upon under the particular law to enforce that quality of a commissioner's authority and for any reason has had occasion to touch upon the underlying situation, it has more than once been held or plainly indicated that testimony offered to show birth in this country and to sustain the consequent rights claimed is often, to say the least, doubtful and unreliable, and even when not contradicted is not to be accepted as verity. (*Quock Ting* v. *United States*, 140 U. S., 417.) And this view is necessarily involved in the rulings of the *Chin Bak Kan* case when the court refers to the *mere assertion of citizenship* and the inability of claimants to show that the "inestimable heritage" was ever possessed.

This is not strictly the occasion for entering upon the merits of these cases, or rather, as the term "merits" in its ordinary use is hardly applicable here, upon the controlling considerations respecting the jurisdiction and finality of the determination of the tribunals below. The immediate question is whether the admission of these Chinamen to bail is in accordance with the law. But since it is highly desirable, if not necessary, that the essential character of the cases—the *bona fides* of the claims, the propriety of pursuing the course of appeal into this court in view of the repeated determinations of the court on all the points in issue—should be before the court as bearing substantially upon the question of admis-

sion to bail, I desire to comment upon the real situation and meaning of these cases, as the foundation for a related motion to dismiss or affirm.

I.

THE ESSENTIAL CHARACTER OF THE CASES; THE LACK OF MERIT IN THE APPEALS.

The assignments of error contain much that is trivial and frivolous, and nothing substantial. It is as though counsel were unaware of recent decisions of the courts, and especially of this court. The regularity of process; the curing of formal defects—if such exist—by subsequent proceedings; the jurisdiction of the commissioner, and the finality of his decision; the constitutionality of the laws, including the acts of 1892 and 1893; the effect of the treaty of 1894 thereon—all these points have been considered by the court, most of them have been repeatedly determined, and all of them have been positively and conclusively determined.

Some of the objections are not only trivial, but seem simply ignorant or even misleading. For instance, it is said that the Chinamen were not brought before the commissioner according to section 13 of the act of 1888, in that they were arrested by a Chinese inspector without a warrant. But section 6 of the act of 1892 authorizes various United States officers, including Chinese inspectors, to arrest, and does not specifically require a warrant, which is in entire accordance with the

usual rule and practice respecting the immediate arrest when necessary of ordinary misdemeanants. The principle is also illustrated in the broad and unrestricted power given to all peace officers of the several States and Territories by the original Chinese exclusion law (section 12, act of 1882, as amended by act of 1884). Further, as the record shows, warrants in these cases were duly issued, executed, and indorsed accordingly by the United States marshal. Probably the exact course pursued is that indicated in rule 24 of the current regulations of the Department of Commerce and Labor, to which the Bureau of Immigration has been transferred from the Treasury Department. This rule in substance provides that every Chinese laborer found without a certificate of registration shall be arrested, after being allowed a reasonable opportunity to produce his certificate, by any officer of the Chinese exclusion service, and shall be taken before a justice, judge, or commissioner, *in order that a warrant may be issued upon oath for the commitment and trial of the accused*. The entire legality and propriety of this rule can not be challenged.

In the case of *Chan Gun* v. *United States* (9. D. C. App., 290), where the Chinaman had been arrested by a deputy collector of internal revenue, without a warrant, the court said: "We see no reason why the arrest in all such cases may not be made by the proper officers without a warrant founded on a complaint under oath."

I have analyzed this particular example of the objections in order to show their general character.

Let us now consider for a moment what recent cases have decided.

The case of *Chin Bak Kan* (186 U. S., 193), citing and reaffirming several previous decisions, held that the treaty of 1894 did not repeal existing law (see also case of *Lee Yen Tai*, 185 U. S., 213), the acts of 1892 and 1893 being before the court; that defects in complaint or pleadings did not affect the authority of the commissioner or judge or the validity of the statute; that as applied to aliens there is no question of the validity of the provision that a Chinaman must establish his right to remain in this country by affirmative proof to the satisfaction of the judge or commissioner—in other words, the adjudication of the judge or commissioner is final; that compliance with this requirement can not be avoided by the mere assertion of citizenship, the "inestimable heritage" of which "is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency without being able to show that it was ever possessed." That opinion also declared that the court can not properly reexamine facts already determined by two judgments below; that the policy of the legislation is opposed to numerous appeals, and that a Chinese laborer who has evaded the executive jurisdiction at the frontier is not entitled to demand repeated rehearings on the facts.

Whether the statements of the Chinamen now before the court as to the length of their residence in this country be true or not, the presumption from all the facts is pretty plain and conclusive that when they did enter this country they evaded the executive jurisdiction.

The effect of the *Chin Bak Kan* decision, restating principles previously decided, and the well-known opinions of the court generally sustaining the constitutionality of the entire body of Chinese exclusion laws, render it unnecessary to refer to other recent cases.

Only two new contentions are advanced by the appellants, and both are without merit. They say that the new law of 1902 repeals by implication the acts of 1892 and 1893, and that the offense is barred by the operation of sections 1046, 1047, Revised Statutes.

The act of April 29, 1902 (32 Stat., 176), has not heretofore been before the court. It has been considered by the Attorney-General on two administrative questions arising under it (24 Op., pp. 544, 561). The act provides (sec. 1) that all existing Chinese exclusion laws, specifically including certain sections of the act of September 13, 1888, theretofore considered to be of doubtful force as existing law, be "reenacted, extended, and continued so far as the same are not inconsistent with treaty obligations until otherwise provided by law." The second section of that act, by con-

necting the various acts and the treaty of 1894 in conferring authority to make regulations upon the Secretary of the Treasury, makes it evident that Congress considered the entire scheme of exclusion law embracing the treaty as forming one complete, harmonious, and consistent whole. There is, therefore, nothing in this act to support objection to the laws, but rather the contrary. The act manifestly continues and reaffirms all the previous laws. If the phrase "so far as the same are not inconsistent with treaty obligations," is appealed to, it is only necessary to say that the court fully determined in the cases of *Lee Yen Tai* and *Chin Bak Kan* that the treaty did not repeal existing law. In the *Chin Bak Kan* case the very acts which are now involved, those of 1892 and 1893, were held to be unaffected by the treaty, on the authority of the *Lee Yen Tai* case, and in that case the court used this language:

> So far from there being any inconsistency between the statute and treaty here in question, the twelfth section of the act of 1882, as amended in 1884 and continued in force for ten years from and after the passage of the act of 1892, is in absolute harmony with the treaty, and can be enforced without affecting or impairing any right secured by the treaty. On the contrary, the enforcement of that section as amended will serve to advance the purpose of the two countries in respect of Chinese laborers, as avowed in the treaty of 1894.

In the first of the Attorney-General's opinions above cited, the phrase just quoted from the act of 1902 was considered simply as confirming a previous decision of the Attorney-General which held that one particular provision of the treaty had replaced a slightly varying provision of a certain section of the act of 1888. It appears to me very manifest, as suggested by the second opinion of the Attorney-General (*supra*), that the rule of construction under which repeals by implication are never favored, on the ground that there must be a positive repugnancy between the old and the new law to work an implied repeal, is to be imposed with full force upon the appellants' contention here. The act of 1902 is merely additional legislation on the subject for the purpose of continuing the various laws before the ten-year period of limitation expressed in the act of 1892 had expired. The new act is harmonious with and only supplements the earlier provisions of law. There is little that is new in the new act, and there is nothing repugnant between that and former acts. For the phrase which I have quoted respecting consistency with treaty obligations, which is the only language of the new act suggesting by any possibility varying terms and conditions, was always a rule to be applied in construing the laws and treaties, respectively, and until and unless it should appear beyond doubt that some law subsequent to a treaty was meant to override and displace the treaty engagements.

It is manifest upon inspection that the act of 1902 simply preserves the *status quo ante* as to the ordinary situation within this country presented by these cases. Some new rules are laid down respecting the Chinese relations of our insular and territorial possessions, but this does not affect the present questions.

Section 1046 provides a limitation of five years for prosecutions under the revenue laws or slave-trade laws, and section 1047 imposes the same limitation on suits or prosecutions for penalties or forfeitures. Of course, neither these provisions nor any other statutes of limitation touch Chinese exclusion in the remotest way. But if the case were otherwise, and there were some pegs to be found in language of general import on which to hang an argument, it is sufficient to say that the offense is a continuing one, deepening rather than lessening as time passes and the illegal residence persists. It is the gist of the subject that the Chinaman never had, and has not now, any right to be here. It is from that point of view rather than the criminal side that the question is correctly approached. The defect in title is not cured and a right created merely by the passage of time, as certain civil and criminal liabilities or disabilities have always been removed in obedience to obvious reasons of governmental and legal polity. A Chinaman here without right is to be deported wherever he is discovered, apprehended, and heard, no matter how long this may

be after his illegal entry, or the date when his remaining here became illegal. He is not being tried for a crime; his status is determined upon "due process," as has been decided time and again. The single question is, Has he any right—the civil right or privilege—to be in this country? By no stretch of logic or imagination can the theory of the limitation of actions be applied to his case.

I have intentionally developed the nature of these cases beyond the strict demands of these motions in order that the court may know their essential character in considering the question of bail. Have the appeals merit? Do they exhibit *bona fides?* It seems to me that these questions are pertinent; that when the power and discretion of judges and courts respecting bail are regarded it is proper to present for careful scrutiny and deliberation all the elements of the case, the grounds of the appeal as just or flimsy, the underlying good faith, or the manifest endeavor merely to obtain delay, as the case may be. It is in this way, as well as by reference to the particular statutes and technical rules, that the mind of a court is informed and its will and conscience moved to action. By this means the court's discretion (assuming it to be unrestricted by positive law) is not challenged at all, but is merely appealed to and prayed to consider the matter thoroughly.

I trust, therefore, that in speaking frankly of these appeals I shall not subject myself to misapprehension or the imputation of any lack of respect

whatever. I assume that appeals are usually allowed and admission to bail ordered by justices of this court, acting as individuals, as by judges generally, almost as matter of course; that such action is often so clearly proper and so nearly a matter of right as to pass like most formal proceedings which call only for brief consideration and first impression. It seems that the case may now be called up with propriety on this motion, for reconsideration, so to speak, and for deliberate determination by the court *in banc* of the points involved in the allowance of the appeal and the admission to bail. I submit, in other words, with great respect, that such applications for appeal should not pass with formal inspection and on impression, but should receive full consideration and elicit conviction in the judicial mind before the application is granted.

I submit that these appeals illustrate, as strikingly as any cases could, the extension and abuse of the just privilege of appeal. It is certain that Congress intended the determination of the rights of a Chinaman to be prompt and final in the lower tribunals. No appeal was given to the Government and a single appeal to the Chinaman, viz, from a commissioner to a district court (sec. 13, act of 1888). The spirit and purpose of the law, as well as its terms, command speedy hearing and deportation, if the right to remain does not appear. This court has taken note of the fact that the policy of the legislation is opposed to numerous appeals and repeated rehearings. Nevertheless,

on all sorts of grounds and pretexts, by appeals and through habeas corpus, long strings of such cases continue to come before the court. The present list contains seven cases; within the past two years there have been at least twenty more. Pending hearing in this court, the Chinamen thus obtain a license to remain indefinitely; the delay which principally they seek (for they all wish to return to China ultimately) has been obtained, and one of the strongest objects of the law, speedy determination and action, has been nullified.

I respectfully submit that these appeals ought never to have been sought nor obtained; that when we come to examine the facts with any particularity, in the light of the decisions, the appeals are manifestly unfounded, without merit, and are interposed merely for delay. I submit that when such an application is made to a court or a judge, the records ought to be particularly scrutinized before an appeal is allowed, in order to learn whether the docket is to be encumbered and the court's time taken up to no purpose. How long and how often must this court go over the familiar ground? When the very last case decided by the court, affirming previous cases, says that the treaty of 1894 did not disturb the laws in general, nor the particular laws now invoked, how can it be justifiable to bring another case here on the ground that the construction of the treaty is drawn in question, and, in order to make weight, to proffer other "errors" which are the merest formalities

and have often been disposed of? The only exception, apparent rather than real, viz, the effect of the new act of 1902, suggests no change whatever, for its reservation of consistency with treaty obligations has, so far certainly as this case is concerned, already been met and enforced by the court's previous decisions. The court has already declared that the very laws called up are harmonious with the treaty.

Finally, on this branch of the case, I submit with respect the following contention: that even if it should be found that the particular laws presently to be cited do not restrict the general discretion lodged in the courts to admit to bail, and the court should take the view that cases not now foreseen may present meritorious contentions, properly invoking the exercise of the power to admit to bail while the cause is pending here, notwithstanding the general intention of the law forbidding delay, then, I say, that these particular cases should nevertheless not be protected by such doctrine, but demand that the court's discretion be exercised adversely to the appellants' offer of bail. A similar situation was presented in the extradition case of *Whitaker Wright* (190 U. S., 40), heard and decided by the court at the last term, wherein the court says (p. 63):

> We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested

> by statute, or that while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case and whatever the special circumstances extend that relief. Nor are we called upon to do so, as we are clearly of opinion on this record that no error was committed in refusing to admit to bail, and that although the refusal was put on the ground of want of power the final order ought not to be disturbed.

So here the position taken in the passage quoted suggests and justifies the view that although the court might reserve the power to take bail in general, it may properly decline to do so under circumstances revealed by these particular cases, and, to carry out that result, vacate the order made. I do not know any reason for supposing that the court may not with perfect right in a proper case reverse favorable action already taken as fully as it may affirm or decline to disturb an order entered below refusing bail.

II.

THE LAW AS TO BAIL.

But there are particular provisions of law as to bail in Chinese cases. The Government contends that these statutes limit the discretion of courts and judges and forbid the taking of bail.

As preliminary it may be observed that section 13 of the act of 1888 (25 Stat., 476; reenacted by act of April 26, 1902, 32 Stat., 176), allowing a

Chinaman ten days to appeal to the judge of the district court, shows the intention of Congress that there shall be no delay.

Section 5 of the act of 1892 (27 Stat., 25) provides that in the case of a Chinaman seeking to enter the United States, to whom the privilege has been denied and who has applied for habeas corpus, no bail shall be allowed, and the application shall be heard and determined promptly. This provides for the "landing" or entry cases, and is of course clear and positive.

One of the paragraphs of the act of 1893 (28 Stat., 7) provides as follows:

> Such order of deportation shall be executed by the United States marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States marshal, and shall not be admitted to bail.

This provision applies, we contend, to all cases of deportation of Chinamen who are within the country—that is, to all cases whatsoever coming before a commissioner or district judge.

The suggestion has been made in other cases that the phrase "such order of deportation" refers exclusively to the cases of deportation contemplated by the first section of the act of 1893 amending the sixth section of the act of 1892—that is, to nonregistered laborers' cases. Even so, all the

present cases are embraced within the rule as to bail upon this strict construction, for they are cases of nonregistered laborers. But such construction is indefensible. The act of 1893 amends the act of 1892 and makes certain additions to the law. Between the amending portion of the act of 1893 and the phrase in question are inserted new and substantive provisions of law referring to merchants as well as laborers, making the restriction of "such order of deportation" to those arising under section 6 of the act of 1892 as amended a forced and violent assumption. This contention of an exclusive connection is plainly erroneous in the nature of the case, for the act of 1892 itself in its other sections provides for deportation generally and continues in force all existing laws. It is absurd and unreasonable to argue that the words "such order of deportation" do not embrace every order of deportation made under any of the connected body of laws in the Chinese exclusion scheme.

This view would cover the case even if the extreme and fanciful argument were suggested that where the *claim* is that of merchant status or citizenship the case does not accurately fall within the nonregistered laborer class. The *finding* of the commissioner or the district court is the test, and, indeed, all cases are ultimately to be placed in that class, and the Chinamen are adjudged to be and are expelled as nonregistered laborers, whatever their claims. And this is so, whether they were within the country at the ap-

pointed time and failed to register—the exclusive condition of the right—or have entered since, in which case they are utterly without right under all the laws—treaties as well as statutes.

It may be suggested that *United States* v. *Gooding* (12 Wheat., 460, 476–7) completely restricts the word "such" to its antecedent in the particular act. But this can not be maintained because of the difference in the laws and the circumstances of the two cases, and because, as above contended, the particular act here is merely an amendment and one of a series of connected laws, back through all of which its intendment clearly relates. The decision in the Gooding case was based upon the strictness of criminal pleading, and simply was that "such" following "any" in a highly penal law imposing punishment for fitting out vessels for the slave trade within the jurisdiction of the United States must be held to embrace only the vessels as described and located within our jurisdiction; otherwise the sailing from our ports of foreign vessels designed for that trade and casually here would constitute an offense within the purview of our laws, which it was unreasonable to suppose the legislature could have intended; and therefore it was necessary to aver that the fitting out, etc., was within the jurisdiction of the United States.

Here there is no such question of pleading, no ambiguity or insufficiency of averment to be guarded against lest a class of things plainly

without the reach of the law should be brought in. In the present matter Congress has in successive related laws provided for the single remedy of deportation in any and every case where a Chinaman is not entitled to remain here. Congress has laid down some particular rules by which a certain class, although admitted to be laborers, and therefore in general to be expelled, might (being here at a certain period in the past) have obtained and retained the right to remain. Congress has provided also by these particular rules that, failing to secure the right as provided, such Chinamen should be subject to the same deportation as all other forbidden Chinese. In other words, there is only one kind and condition of "deportation," viz, that of those who, for whatever reason and whatever the false claim advanced, are not entitled to remain in this country. Hence "such deportation" in the act of 1893 has for its antecedent *any* deportation ordered under the previous laws to which that act was simply a supplement and addition as the last link of a chain.

The suggestion has been made at some stage of these cases, I believe, and may be repeated here, that all law on the subject applies only to the so-called "landing cases." But I think it is very evident, as heretofore indicated, that just as section 5 of the act of 1892 applies to the seaport or frontier cases where admission to the country has been refused, so section 2 of the act of 1893 applies

to cases where clandestine entry has actually been effected; that is, to all remaining cases.

Now, while the intention of Congress is clear and certain that there shall be only one appeal, that bail shall not be taken, but that the Chinaman shall remain in custody of the United States marshal, and that the order of deportation shall be executed with all convenient dispatch, nevertheless it may be contended that this applies only in case a further appeal shall not be allowed, and that where on any ground such an appeal has been obtained to the circuit court of appeals (as has happened) or to this court, the law ceases to be of effect and the door is wide open to delay and admission to bail. It may be that the allowance of an appeal in the discretion of a judge or court carries with it as a rule and as a necessary consequence the operation of the principle of *supersedeas*, and in a case like this, where the very question is the personal right to escape the adjudged process, of admission to bail. But on this point I submit with respect that the state of the law should operate with great force upon the judicial discretion. Let us assume, although it is difficult to do so, that some unanticipated question may arise appealing very strongly to fundamental notions of right and justice and unmistakably calling for favorable exercise of judicial discretion to allow an appeal, whereupon in such a case it might naturally be deemed harsh and obnoxious to principle to maintain in close custody pending the

appellate adjudication. But here, where the case is so clear, where there is absolutely no merit, and the court is improperly called upon to announce again the rules conclusively settled in many cases, where plainly no right exists and delay is of the first consequence and the usual and apparent motive, I feel justified in insisting that the intention and mandate of the law that hearing shall be speedy and final, that there shall be but one appeal and no bail, passes straight over any residuum of doubt and ought to be regarded and obeyed by the judicial discretion.

Reserving, then, *arguendo*, the possibility of some case justifing action, I suppose it is certain that no general or fundamental right of appeal may be imported into this situation; that where Congress has given one appeal specifically no further appeal is to be inferred or implied, and that the allegation of fully settled questions of constitutionality and treaty construction can not avail to impose and establish a new course of appeal in these cases. Indeed, since under the general rule appeals exist only where the law expressly gives them, and where one appeal has been explicitly given, that is exclusive and no other exists, the first question at the threshold is, whether there is any other appeal than that to the district judge, and whether the appeal herein ought to have been allowed.

Although a special *allocatur* was granted here, the application for which shows probably that

counsel were not confident of their ground, yet necessarily the appeal prayed must be viewed as claimed of right (as calling for the construction of a treaty, let us say), for I do not understand that the special allowance of appeal so familiar in practice involves more than a certain formal deference (and reference) to the trial or appellate judge, or can confer a right not created or recognized by specific law. The general rule is that unless an appeal is clearly given by statute, there is no right of appeal (*Railroad Co.* v. *Grant*, 98 U. S., 398; *McKane* v. *Durston*, 153 U. S., 684; *Kohl* v. *Lehlback*, 160 U. S., 293); just as the general rule is that the appellate jurisdiction of any court and of this court must be so conferred; that is matter *stricti juris*. (*Sherman* v. *Grinnell*, 123 U. S., 679; *Interstate Commerce Commission* v. *Brimson*, 154 U. S., 447; *United States* v. *Gilliet*, 164 U. S., 42; *District of Columbia* v. *Eslin*, 183 U. S., 62.)

It is true that Judge Deady held in *United States* v. *Gee Lee* (50 Fed. Rep., 271), that the words "judge of the district court" in section 13 of the act of 1888 are equivalent to "district court," and accordingly held that a writ of error lies to the circuit court of appeals under section 6 of the act creating that court. The contrary view, however, is expressed in the case of *Chow Loy* v. *United States* (112 Fed. Rep., 354). There the question was as to the right of the district judge to dismiss an appeal for lack of prosecution. Judge Brown, citing numerous authorities, held that the terms

"judge of the district court" and "district court" are not interchangeable, and quoted with approval the following language of the court below in reference to section 13 of the act of 1888:

> As the provision with reference to the return of the warrant in the same section expressly distinguishes between a judge of a United States court and a United States court, it would seem to follow, on just rules of construction, that this distinction must run throughout the section. (110 Fed. Rep., 953.)

Judge Brown also declared that the decision in the *Fong Yue Ting* case contains expressions inconsistent with the view of the statute taken by the court in the *Gee Lee* case.

I concede that the practice on the subject of bail in the various districts is conflicting. At some times and in some jurisdictions bail has been or is even now taken. But on the whole I believe that the practice tends to the refusal of bail more and more, or at least to postpone action and await the determination of this court. But whatever the practice has been, the question is now up for settlement by this tribunal. The point was presented to the court by a preliminary motion in the *Chin Bak Kan* case, but was not determined. It is for this court to say whether, after full review of the subject, bail may be allowed, and neither erroneous construction nor faulty practice elsewhere can affect the matter.

Many determinations upon this subject in the courts below have evidently passed without opinion or reported decision. The reported cases are few and not particularly enlightening.

In the case of *Ah Kee* (21 Fed. Rep., 701), it was held that petitioner might be admitted to bail pending habeas corpus proceedings, and the decision was to the same effect in *In re Chow Goo Pooi* (25 id., 76). In the case of *Ah Moy* (ib., 808), the same court denied bail where, after final hearing on habeas corpus, petitioner applied for release on bail until the departure of the vessel.

Those cases arose before the passage of the act of 1892. Since that time the only reported decisions on this point seem to be those of *In re Chin Yuen Sing* (65 Fed. Rep., 788) and *Chan Gun* v. *United States* (9 D. C. App., 290). In the former case an application for release on bail was made pending appeal from the decision of the circuit court. Judge Lacombe, denying the application, remarked that "it would be a singular exercise of discretion which would release an immigrant on bail after the court has decided that he should not be permitted to enter the country, when the statutes require that he shall not be released on bail before the court has so decided."

In the *Chan Gun* case there was a cross appeal by the United States from an order of the supreme court of the District of Columbia admitting the Chinaman to bail pending his appeal to the court of appeals. The court was of opinion that the

order was erroneous, stating that the right to bail is not determinable by the rule applicable to ordinary cases under the writ of habeas corpus, but by the provision of section 2 of the act of 1893 prohibiting bail. "The execution of the order [of deportation] was delayed by the appellant's proceedings, and the statute, though harsh in its terms, necessarily governs the case" (pp. 304–305).

The *Chan Gun* case related to a Chinaman within the country, who, after arrest, was taken before a justice of the supreme court of the District of Columbia. In all the other cases just cited the Chinamen were seeking to enter the country and to escape the executive jurisdiction through habeas corpus.

Apart from the specific statutes cited, I do not think that general principles can be successfully invoked against the Government position in this matter. The constitutional provision forbids excessive bail; it is silent on the point whether or not bail shall be taken at all. It does not seem to me that the idea in general of bailability in most offenses, and the doctrines which favor personal liberty and which assume a man to be innocent until he is proved guilty, should rule this subject. There is no question of offense or crime here at all. Deportation proceedings are not the trial of a crime or offense against the United States, but the ascertainment of a fact in a civil controversy by appropriate and lawful means—the fact, namely, whether the conditions

exist upon which the particular alien may remain in this country. (*Fong Yue Ting* v. *The United States*, 149 U. S., 698.) Hence it is unnecessary to consider the doctrines laid down in the cases of *In re Claasen* (140 U. S., 200) and *Hudson* v. *Parker* (156 U. S., 277), which arose under criminal statutes. At the most the subject is to be regarded as quasi-criminal, and the "offense" not as a technical term, but in its broad meaning of entering the country clandestinely. But a Chinaman is deported not for that reason but because as an abstract proposition of law the particular individual is without any civil right to come into the country, or, having entered, to remain here.

Now, Congress, in order to expedite deportation, has chosen to restrict the rights of Chinamen in respect to this civil privilege of residence here, which they unsuccessfully claim, by giving them one appeal and keeping them in custody without enlargement on bail. Indeed, it may be said that in giving that appeal and in not requiring the determination of the commissioner to be final, as the determination of the executive officers is at the frontier, Congress has shown liberality and consideration on this point rather than restriction. Therefore, if a Chinaman, charged with knowledge of the law, of course, is unwilling to accept the determination of his status by the two tribunals below, which are meant to be final, and seeks delay and a further appeal, it is his own fault if, pending that appeal, he must remain in custody.

He has deliberately chosen to pursue that course, knowing its burden and penalty—if the mandate of the law regarding speedy deportation and bail are to be so regarded. Assuming he may have some claim of right which on the whole justifies the appeal, then he must take the burden with the benefit, and accept with all possible equanimity his detention and custody. That is, indeed, his own choice, and it is strange if, when the meaning and motive of the law are so clear, a refusal by the Chinaman himself to be bound by its terms and to conform to its results, after due adjudication, should succeed in obtaining for him the privilege of remaining at large in this country for an indeterminate period.

I submit that under the written law, which in no way authorizes admission to bail in these cases, but, on the other hand, expressly forbids it, and under a more enlarged view of the subject (disclaiming any intention to encroach by suggestion upon the judicial discretion), these Chinamen were not entitled to be admitted to bail; and the order directing that bail be taken should be vacated.

If the matter were not controlled, as we contend, by the negative provisions—the prohibitions, that is, of the law—even then, while the general and inherent authority of courts to admit to bail might be found sufficient to cover the special Chinese-exclusion case, certainly no affirmative authority to take bail in such cases can be found in the statutes. If we should construe, with great

freedom, section 716, Revised Statutes, authorizing the issue of all writs not specifically provided for; or section 945, declaring that bail, when required or allowed in civil causes, may be taken by a United States commissioner; or the provisions of sections 1014 and 1015, covering bail in criminal cases, on no reasonable grounds can it be made to appear that Chinese-exclusion causes are fairly included within any of these laws. The civil causes contemplated are ordinary suits and familiar situations and do not embrace this peculiar proceeding to determine the civil right of remaining here. And it has been decided in the *Fong Yue Ting* case, and other cases, that a Chinese-exclusion case is not criminal; a crime against the United States is not presented.

So far, then, as affirmative law goes, and disregarding still, for the sake of argument, a clear denial and prohibition of bail by the statutes cited, the fact is that the Chinese case falls between the two categories of civil and criminal as used in the Revised Statutes respecting bail, and is unprovided for on that point. In certain aspects the subject is quasi-criminal, and there is a *casus omissus* in the written law. If inherent notions of the power of courts are appealed to, the matter should be viewed by judicial discretion in the light of our declared and positive policy.

III.

SUMMARY OF REASONS FOR DISMISSING OR AFFIRMING.

I am convinced, after the foregoing review of these cases, that it is eminently proper, and, indeed, logical and necessary, to couple with the motion to vacate the order admitting to bail a motion to dismiss or affirm these appeals, upon the decisions of the court herein cited and upon the other well-known cases in Chinese exclusion law decided by the court.

It is not intended by this to submit alternative motions, either a motion to vacate the bail order or a motion to dismiss or affirm. It is true that to grant the latter motion would dispose of these cases completely. It is submitted, however, that the motions should be regarded as related and consecutive and not as disjunctive; that both motions should be acted upon. It is certainly very important to obtain from the court a clear and definitive ruling on the point of bail. If the court shall be favorably disposed toward the motions, then I think it is logical to regard them as naturally and properly leading to an integral disposition of the whole subject: First, a determination that the Chinamen are not entitled to bail, and thereupon, second, and forthwith that the appeals should be dismissed or affirmed and the appellants deported immediately.

It is also submitted that a foundation is laid for the motion to dismiss or affirm, not merely color-

able or illusive, in the suggestion that jurisdiction in this court is doubtful or incomplete. Here we get back, it is true, to the consideration of the reasonableness or propriety of taking these appeals. But it is suggested that the appeals themselves are colorable and without real claim, rather than the idea of defect in jurisdiction, on the ground that the mere easy allegation of a question of treaty construction does not bring that basis of jurisdiction into the case with any sincere meaning or any substantial effect. The assertion of jurisdiction is disingenuous; the point has been repeatedly decided; all judicial jurisdiction really ended below. The defect or doubt in jurisdiction is therefore patent, and if a formal claim of jurisdiction exists, it is *only* formal, and the real elements of the matter produce a a genuine dissent from the claim in an open mind.

Submitting, then, that the existence of any jurisdiction in this court under all the circumstances revealed is at least an ambiguous matter, and certainly not established if reason and propriety may be invoked, I may proceed to state the grounds upon which the appeals, if they ought not to be dismissed for lack of jurisdiction, ought certainly to be affirmed.

I have plainly shown, I think, that the appeals are unfounded, unjustifiable, trivial, and frivolous; that they have been interposed merely for the purpose of delay; that they are based upon assign-

ments of error which are entirely without merit, and which embrace propositions conclusively and repeatedly determined by this court. I am very certain that no cases were ever decided by this court by dismissing or affirming the appeals without hearing oral argument, and by a mere note of decision without opinion, which received that disposition with more manifest propriety than would be the case with these appeals if the court should so determine them. It is difficult to imagine a case which more strongly invokes the motto, *ut sit finis litium*, a principle of the law of the first magnitude which it is important to emphasize from time to time.

Much has been said lately, and by eminent authority, relative to the abuse of appeal in criminal cases, referring even to capital cases and other criminal prosecutions of great consequence. Much sober protest has appeared in public journals of responsible character, and the discussion is now gravely proceeding in current law reviews. Apparently American development respecting this branch of legal procedure, continuances, delays, appeals, can not be compared favorably with the orderly yet swift administration of the common law in the country of its origin and the constituent parts of her empire. In that subject the countervailing considerations of the great guaranties from time immemorial for the protection of those charged with crime, may operate on the

other side of the argument with impressive force. But in this matter now before the court there is no question of crime or guilt or innocence, no great guarantee the underlying reason of which demands that we err, if necessary, in favor of the accused. The inbred sense of justice, recognized fully by these very laws which enforce the sovereign power to exclude or expel those foreigners whom we do not choose to admit to the privilege of residence among us, is a sufficient guaranty respecting due determination of this question of merely civil right. Accordingly, an orderly and sufficient method has been established, and the proceedings should stop when that termination has been reached. No principle related to the "great guarantees" of the common law or of our Constitution requires more, and the most tender and scrupulous regard for the rights and immunities of defense should be satisfied. The policy and purpose of the law respecting such Chinamen and the demand for prompt decision and action on their cases are too clear for augument.

I submit and insist with great respect that these appeals ought to be dismissed, or the orders appealed from affirmed.

HENRY M. HOYT,
Solicitor-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1908.

FILED
NOV 14 1908
JAMES H. MCKENNEY,
Clerk.

AH HOW, ALIAS LOUIE AH HOW, APPELLANT, v. THE UNITED STATES. } No. 307.

CHU DO, ALIAS CHU GEE, APPELLANT, v. THE UNITED STATES. } No. 308.

LEW GUEY, APPELLANT, v. THE UNITED STATES. } No. 309.

TOM HONG, ALIAS HOM POE, APPELLANT, v. THE UNITED STATES. } No. 310.

TOM DOCK, ALIAS HOM DOCK, APPELLANT, v. THE UNITED STATES. } No. 311.

YUNG LEE, APPELLANT, v. THE UNITED STATES. } No. 312.

LEE KIT, APPELLANT, v. THE UNITED STATES. } No. 313.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

SUGGESTION OF ADDITIONAL AUTHORITIES ON BEHALF OF THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

AH HOW, ALIAS LOUIE AH HOW, APPELLANT, v. THE UNITED STATES.	No. 307.
CHU DO, ALIAS CHU GEE, APPELLANT, v. THE UNITED STATES.	No. 308.
LEW GUEY, APPELLANT, v. THE UNITED STATES.	No. 309.
TOM HONG, ALIAS HOM POE, APPELLANT, v. THE UNITED STATES.	No. 310.
TOM DOCK, ALIAS HOM DOCK, APPELLANT, v. THE UNITED STATES.	No. 311.
YUNG LEE, APPELLANT, v. THE UNITED STATES.	No. 312.
LEE KIT, APPELLANT, v. THE UNITED STATES.	No. 313.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

SUGGESTION OF ADDITIONAL AUTHORITIES ON BEHALF OF THE UNITED STATES.

I desire to submit to the court the following authorities upon the meaning of the principle of *stare decisis*, as applied under certain circumstances, which bear directly upon the right or

propriety of taking these appeals and the attempt evident in them to reargue settled questions.

This court has repeatedly declined to permit questions fully decided by it in former cases to be reargued.

In *United States* v. *422 Casks of Wine* (1 Pet., 547) Mr. Justice Story, delivering the opinion of the court, said: "It is not the habit of this court to consider points again open for discussion which have been once deliberately decided."

The cases of *Davies* v. *Slidell* and *Haynes* v. *Pickett*, reported briefly in the Appendix to 154 U. S., at pages 625, 627, were decided on the authority of earlier cases involving the same issues. In each case the court stated that it did not feel inclined to hear a reargument of the questions which had already been decided.

In the case of *Wright* v. *Sill* (2 Bl., 544) the court, remarking that the questions involved had been repeatedly before it, and had been uniformly decided in the same way, said:

> Whatever differences of opinion may have existed in this court originally in regard to these questions, or might now exist if they were open for reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhausted in the earlier cases. It could subserve no useful purpose again to examine the subject.

In *Minnesota Mining Co.* v. *National Mining Co.* (3 Wall., 332) it appeared that the question had already been twice before the Supreme Court, and now, disguised by some unimportant variations in title and form, the matter was again presented. Counsel for the defendants was beginning to argue the case on the merits, "when certain of the older associates, who recognized the case as an old one, interposing, he was stopped by the Chief Justice, with an intimation that the court, as at present advised, thought argument on them unnecessary, and that he might consider himself as relieved." The court expressed itself in the opinion as follows:

> This is another, and it is to be hoped the *last*, attempt to persuade this court to reverse their decision in this case. * * * Parties should not be encouraged to speculate on a change of the law when the administrators of it are changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants challenging the justice of their well-considered and solemn judgments.

I submit that the principle of these authorities applies to the present situation, and is by no means restricted to a situation wherein the particular controversy is absolutely identical with some previous appearance in respect to subject-matter, as, for instance, a piece of property, or the actual

individual interests involved, even if the formal parties are not the same; that is to say, the principle applies fully wherever the situation is precisely the same, even if the parties are entirely different.

HENRY M. HOYT,
Solicitor-General.

NOVEMBER 12, 1903.

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